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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL JOSEPH MARTINEZ,

Defendant and Appellant.

_____/

A145500

(Alameda County Super. Ct. No. 129845)

In 1997, appellant Paul Joseph Martinez (appellant or Martinez) was convicted of being a felon in possession of a firearm (Pen. Code, § 12021.1) and the trial court sentenced him to 25 years to life in state prison.[1] In 2014, Martinez filed a petition to recall his sentence pursuant to Proposition 36 (§ 1170.12). The trial court denied the petition, concluding Martinez was ineligible for resentencing pursuant to Proposition 36

[1] Unless noted, all further statutory references are to the Penal Code. Martinez appealed from the judgment and this court affirmed in an unpublished opinion. (*People v. Martinez* (Dec. 13, 1999) A084183 [nonpub. opn.] (prior opinion).) We adopt and incorporate by reference the facts from the prior opinion. In assessing eligibility for resentencing under Proposition 36, we may consider the record of conviction, which includes the facts recited a prior appellate opinion. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286 (*Hicks*).)

because he was "armed with a firearm during the commission of the current commitment offense[.]"

Martinez appeals from the denial of his Proposition 36 petition. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Underlying Offense, Conviction, and Sentence

"On December 25, 1996, near 2:30 a.m., Oakland Police Officers Jason England and John Low were on patrol with a prisoner in custody, when they heard a report that a man with a gun was walking on the street. The officers were in the area that was mentioned, and England saw a man (appellant) who matched the description of the suspect. Accordingly, England drove a few blocks away, dropped off Low and the prisoner, and returned to the area in question. He located appellant, got out of his car with his gun drawn, and ordered appellant to the ground. Appellant refused and he tried to walk away.

"Meanwhile, Officer Low, realizing that his partner might be in danger, decided to release the prisoner (who was in custody for being drunk in public) and to return to the area where Officer England was confronting the suspect. When Low arrived, he saw that appellant was being uncooperative, so he too drew his gun and ordered appellant to the ground. Now confronted by two armed officers, appellant complied. England then searched appellant and found a loaded .357 revolver tucked into his pants underneath his shirt."

The prosecution charged Martinez with being a felon in possession of a firearm (§ 12021.1) and alleged he had suffered three prior convictions within the meaning of the Three Strikes Law: forcible rape, (former § 261, subd. (2)), kidnapping (§ 207), and assault with a deadly weapon on a peace officer (§ 245, subd. (c)). In 1997, a jury convicted Martinez of being a felon in possession of a firearm (§ 12021.1) and found the prior strike allegations true. The court sentenced Martinez to 25 years to life in state prison.

Proposition 36 Petition

In 2014, Martinez filed a petition in propria persona to recall his sentence pursuant to Proposition 36,[2] and a supplemental brief addressing the "'armed with a firearm' exclusion[.]" In a May 2015 written order, the court denied the Proposition 36 petition. The court took judicial notice of "the court file, . . . the record of conviction[,] including the nonpublished court of appeal opinion affirming the judgment (A084183) and the reporter's transcript of the preliminary hearing[.]" Relying on several cases, court determined Martinez was "armed with a firearm during the commission of the current commitment offense" and was therefore ineligible for Proposition 36 relief.

DISCUSSION

Until 2012, California's Three Strikes law required a court to impose a minimum sentence of 25 years to life for a defendant convicted of a felony—no matter what the felony—if he had been previously convicted of two prior "serious" or "violent" felonies (strikes). (§§ 1170.12, subd. (c)(2)(A) (2011) & 667, subd. (e)(2)(A) (2011).) In 2012, the voters passed Proposition 36, which modified the Three Strikes law so the minimum 25-year-to-life sentence may only be imposed on a third or subsequent felony conviction if that conviction is also a "serious" or "violent" felony. (§§ 1170.12, subd. (c)(2)(C) & 667, subd. (e)(2)(C).) Proposition 36 also granted defendants previously sentenced on a non-"serious" and non-"violent" felony to a 25-year-to-life sentence under the Three Strikes law the right to petition for resentencing on that offense. (§ 1170.126, subd. (b).)

Under Proposition 36, some non-"serious" and non-"violent" felonies — when committed as a third strike — will still trigger a minimum 25-year-to-life sentence. (§§ 1170.12, subd. (c)(2)(C), 667, subd. (e)(2)(C) & 1170.126, subd. (e)(2).) One of those exceptions is when "the defendant . . . was armed with a firearm or deadly weapon" "[d]uring the commission of the current offense[.]" (§§ 1170.12, subd. (c)(2)(C)(iii), 667, subd. (e)(2)(C)(iii) & 1170.126, subd. (e)(2); *People v. Osuna* (2014) 225

[2] The Proposition 36 petition included a petition for writ of habeas corpus, which the trial court denied and which is not at issue in this appeal.

Cal.App.4th 1020, 1028-1029 (*Osuna*); *People v. Brimmer* (2014) 230 Cal.App.4th 782, 791-793 (*Brimmer*).)

Martinez claims the court erred in finding him ineligible for resentencing pursuant to Proposition 36 on the ground that he was "armed" while committing the crime of being a felon in possession of a firearm. We review his claim — which concerns statutory construction — de novo, and reject it. (*Brimmer, supra,* 230 Cal.App.4th at p. 790.) Under Proposition 36, a person is "'armed with a firearm'" when he "ha[s] a firearm available for use, either offensively or defensively." (*Osuna, supra,* 225 Cal.App.4th at p. 1029; *People v. White* (2014) 223 Cal.App.4th 512, 525 (*White*) [defendant had firearm under his custody or control and was "personally armed with the firearm . . . because he was carrying—and, thus, had "'ready access'" . . . to—that firearm"].)

Here, Martinez was "armed with a firearm" under Proposition 36 because he had "a loaded .357 revolver tucked into his pants underneath his shirt." In other words, the gun was available to Martinez for offensive or defensive use when he possessed the firearm as a felon. Numerous cases have reached the same conclusion under nearly identical circumstances and we adopt their reasoning. (See e.g., *Brimmer, supra,* 230 Cal.App.4th at p. 796 [defendant was "personally armed" with a shotgun "because he was carrying it"]; *Osuna, supra,* 225 Cal.App.4th at p. 1030 [defendant was "holding a handgun" and was therefore "'armed with a firearm'"]; *Hicks, supra,* 231 Cal.App.4th at p. 285 [defendant had backpack containing a gun]; *White, supra,* 223 Cal.App.4th at p. 524 [defendant "was in physical possession of a firearm when the police officers approached him"].) Martinez has not demonstrated these cases were wrongly decided.

Martinez claims his conduct in being "armed" with the firearm must be "tethered" to another crime, and that this other offense cannot be the crime of being a felon in possession. To support this argument, Martinez relies on case law interpreting the sentencing enhancement applicable when a person "is armed with a firearm" in the commission of a felony, (§ 12022, subd. (a)(1)) which applies only "if the gun has a facilitative nexus with the underlying offense (i.e., it *serves* some purpose in connection with it)[.]" (*Brimmer, supra,* 230 Cal.App.4th at pp. 794-795.) Because "[h]aving a gun

available does not further or aid in the commission of the crime of possession of a firearm by a felon" courts cannot impose the "armed" enhancement in section 12022 to a felon-in-possession crime unless there is some further crime to which the arming can be "tethered." (*Hicks, supra,* 231 Cal.App.4th at p. 283.)

Martinez's reliance on cases interpreting the enhancement in section 12022 is misplaced. Proposition 36 considers whether the defendant was armed "during" the crime rather than "'in the commission'" of it; as a result, Proposition 36 requires "a temporal nexus between the arming and the underlying felony, not a facilitative one." (*Osuna, supra,* 225 Cal.App.4th at pp. 1030-1032; *Hicks, supra,* 231 Cal.App.4th at p. 284.) For this reason, numerous courts have rejected the argument Martinez makes here. (*Osuna,* at p. 1032; *Hicks,* at p. 284; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1313 [noting "illogic" of conflating section 12022 enhancement provision with Proposition 36's ineligibility provision].)

Finally — and like numerous other courts — we reject Martinez's claim that his "non-serious, non-violent" felony was not the type of offense the electorate intended to exclude from Proposition 36 relief. (See *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1055-1056; *White, supra,* 223 Cal.App.4th at p. 526.) We conclude the trial court properly determined Martinez was ineligible for resentencing under Proposition 36 because he was armed during the commission of the offense of possession of a firearm by a felon.

DISPOSITION

The order denying relief under Proposition 36 is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.